IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

LETTERS PATENT APPEAL No. 107 of 1984

with

CIVIL APPLICATION No.1017 of 1984

For Approval and Signature:

HONOURABLE MR.JUSTICE A.M.KAPADIA
HONOURABLE MR.JUSTICE K.A.PUJ

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?
2	To be referred to the Reporter or not ?
3	Whether their Lordships wish to see the fair copy of the judgment ?
4	Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?
5	Whether it is to be circulated to the civil judge ?

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STATE OF GUJARAT & 1 - Appellant(s)
Versus
SHAMBHUBHAI ISHWARBHAI NAI - Respondent(s)

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Appearance :
MR MR MENGDE, Assistant Government Pleader for Appellant(s) : 1 - 2.
MR VIKRAM J THAKOR for Respondent(s) : 1,
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CORAM : HONOURABLE MR.JUSTICE A.M.KAPADIA

and

HONOURABLE MR.JUSTICE K.A.PUJ

Date : 09/04/2007

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE K.A.PUJ)

1. The appellants – State of Gujarat and another have filed this Letters Patent Appeal under Clause-15 of the Letters Patent challenging the order and judgment passed by the learned Single Judge on 21.9.1983 in Special Civil Application No.34 of 1978, whereby the petition was allowed and the present appellants – original respondents were directed to promote the present respondent – original petitioner within one week from the date of the said order and they

were further directed to grant all the benefits including wages, which he would have been entitled if he had been continued in the said post. It was also observed that the original petitioner would be entitled for further promotion if he was entitled, and if his juniors were promoted, he would also be given deemed date of promotion. The present appellants – original respondents were directed to commute the arrears of salary and make payment thereof to the original petitioner within three months from the date of receipt of the writ of the said order from the Court. Rule was made absolute in the petition in the aforesaid terms.

2. The appeal was admitted on 6.3.1984. In Civil Application No.1017 of 1984 rule was issued and ad interim relief was granted in terms of paragraph-7A, whereby stay was granted against the execution and operation of the judgment and order of the learned

Single Judge dated 21.9.1983 in Special Civil Application No.34 of 1978.

3. It is the case of the appellants that the present respondent – original petitioner was Royalty Inspector in the Directorate of Geology and Mining, which was a Class-III post. The next higher post of the same was the post of Assistant Geologist, Class-III and the filling of the said post could be done by two different ways i.e one direct selection and the other by departmental promotion. During October 1973, the present respondent was promoted to the post of Assistant Geologist in Class-II Cadre. In the recruitment rules for the appointment of a person to the post of Assistant Geologist, it was mentioned that for a departmental candidate coming from lower cadre of Class-III, it was necessary to pass the departmental examination, if prescribed by the Government. However, till 1980, no such

departmental examination was prescribed and so there was no question of respondent having not passed the said examination. For the post of Assistant Geologists, the respondent has admitted that Government of Gujarat on 29.7.1964 passed a resolution and issued the syllabus and rules in response to the Departmental Examination to be cleared by all the Gazetted Officers of Directorate of Geology and Mining. The said rule provides as under :-

> "Rule-1 : Every Gazetted Officer in the Directorate of Geology and Mining, Gujarat State shall be required to pass the Departmental Examination according to the following Rules within two years in two chances from the date of his appointment or of the coming into force of these rules, whichever is later."
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> Rule-5 : No Officer, required to pass the examination will be confirmed before he passes the examination. The Government however may grant one or more additional chances in suitable cases, provided that during such period if the

officer concerned is not reverted to his substantive post, if any, he shall cease to earn increments. In case of officers appointed by nomination the period of probation may be extended. Failure to pass the examination may result in termination of service in case of nominated and reversion in case of Departmental candidates."

4. It is the case of the present appellant that the respondent appeared in the said examination held during 1974, 1975 and 1976, but could not clear the said examination. Further more, respondent had also applied to Government for giving him additional chance which according to the Rules was the discretion of the State Government whether to allow the person to appear in the Departmental Examination after he has exhausted the prescribed chances within the prescribed time limit. In view of the provisions of the said rules the respondent was reverted from his services as Assistant

Geologist Class-II to the post of Royalty Inspector, Class-III which has resulted in filing of the Special Civil Application No.34 of 1978 challenging the reversion order.

5. Mr.M.R.Mengde, learned Assistant Government Pleader, has submitted that the learned Single Judge has not considered at all the rules for the post of Assistant Geologist Class-II and has not considered the implementation of the same which has resulted into gross or palpable failure of justice. He has further submitted that there was an error of law and facts in the judgment of the learned Single Judge in saying that there was no such obligation on the part of the present respondent to pass the departmental examination as no such departmental examination was prescribed by the Government till 1980. He has submitted that the respondent prior to reversion was a Gazetted Officer of Directorate of Geology and Mining

and the Resolution dated 29.7.1964 was applicable to him. The learned Single Judge ought to have considered that there was no dispute with regard to Recruitment Rules for the appointment of a person to the post of Assistant Geologist, Class-II and the learned Single Judge has misdirected himself in concentrating wholly on the said Recruitment Rules. He has further submitted that the learned Single Judge has not correctly appreciated the Rules framed by State Government dated 29.7.1964. It was mandatory for any person appointed to the post of Assistant Geologist, Class-II to clear departmental examination as prescribed by the said rules and syllabus for the Departmental Examination of the Gazetted Officers of the Directorate of Geology and Mining. The respondent had not cleared the said examination and had even exhausted extra chance given by the Government and as per Rule-5 of the said rules, there was no other

alternative for the State Government but to revert the respondent to his post in Class-III cadre from which he was promoted to the post of Assistant Geologist, Class-II.

6. Mr.Mengde has further submitted that the petition filed by the present respondent was misconceived as he had applied for 4th chance and only in a suitable case, it was open for the Government to give permission to a person. The suitability of any particular case depends upon the confidential reports of the person in the cadre of Assistant Geologist, Class-II and also depends on the performance in the previous departmental examination trials and on this ground also the respondent was reverted. The State Government was of the view that it was not proper to give him any additional chance for appearing in the examination. He has, therefore, submitted that the reversion order issued by the State government was proper

and legal and the learned Single Judge was in error of law in declaring that the reversion order issued by the Government was illegal and based on non-application of mind.

7. Mr.Mengde further submitted that the learned Single Judge has materially erred in allowing the respondent's petition and further directing the Government to promote the respondent to the post of Assistant Geologist, Class-II within a week and to give all wages including deemed date, if any, and also directing to pay all the arrears within three months from the date of receipt of the order. He has submitted that the said directions are contrary to the settled legal position and hence the impugned order of the learned Single Judge deserves to be quashed and set aside.

8. Mr.Vikram J. Thakor, learned advocate appearing for the respondent – original

petitioner on the other hand has supported the order of the learned Single Judge and submitted that apart from the merit of the case, the Appeal has become infructuous in view of the fact that the order dated 21.9.1983 passed by the learned Single Judge has not been implemented by the appellant and now the respondent – original petitioner has already retired from service with effect from 1.6.1998. He has further submitted that the original petitioner was working as Royalty Inspector / Geological Assistant, Class-III. By order dated 13.10.1973, he was given promotion on the post of Assistant Geologist – Class-II. However, subsequently by reversion order dated 8.11.1977, he was reverted to the post of Royalty Inspector / Geological Assistant, Class-III on the ground of not having passed departmental examination. He has, therefore, filed Special Civil Application No.34 of 1978 challenging the reversion order dated

8.11.1977 before this Court. During the pendency of the petition, the original petitioner passed the required Departmental Examination in the year 1980-81. The learned Single Judge by impugned order dated 21.9.1983 allowed the petition and directed the appellants to promote within one week from the date of the order and also to grant all the benefits including wages. He has further submitted that inspite of the order of the learned Single Judge original petitioner was not given promotion to the post of Assistant Geologist, Class-II. However, by order dated 21.12.1991 he was promoted to the post of Assistant Geologist, Class-II, since he had already passed required examination in the year 1980-81. He has further submitted that after 1991, the original petitioner has worked as Assistant Geologist, Class-II and, thereafter, he retired as Assistant Geologist, Class-II on 1.6.1998.

9. As far as merits of the case is concerned, Mr.Thakor submitted that there is no substance in the appeal and hence the same deserves to be dismissed. The learned Single Judge, after having appreciated all the legal as well as factual aspects, has passed just, legal, proper and equitable order which does not require any interference of the Division Bench while exercising its appellate jurisdiction under Clause-15 of the Letters Patent. He has further submitted that it is the case of the appellant that the original petitioner has not passed the required departmental examination However, as observed by the learned Single Judge the rules for the departmental examination were never prescribed for the promotees to the cadre of Assistant Geologist, Class-II before the year 1980, and the same were for the first time prescribed in the year 1980-81 and he has already passed the departmental examination

in the year 1981 immediately after the rules were prescribed in the year 1980. In this view of the matter, there is no infirmity in the impugned order and, therefore, the appeal is required to be dismissed.

10. After having heard the learned advocates for the respective parties and after having gone through the averments made in the main petition as well as in the present memo of Letters Patent Appeal and after having perused the documents attached with the petition and relevant statutory Rules on the subject, we found that the learned Single Judge has considered the Recruitment Rules for the post of Assistant Geologist, Class-II, which were enacted on 29.2.1964, which were amended by Notification dated 4.8.1972. Under the Rules of February, 1964, there was no provision for promotion to the post of Assistant Geologist from the post of Royalty Inspector. Promotion to the post of

Assistant Geologist was from Geoligical Assistants. The said rules provided that all the selected candidates shall be on probation for a period of two years and shall be required to pass Departmental Examination and Examination in Hindi and Examination in regional language as prescribed by rules. Rules and syllabus for the Departmental Examination for Gazetted Officers of the Directorate of Geology and Mining were issued vide Resolution dated 29.7.1964. Rule-1 of the said rules provided that every Gazetted Officer in the Directorate of Geology and Mining, Gujarat State shall be required to pass the Departmental Examination according to the rules that followed, within two years in two chances from the date of appointment or of the coming into force of the said rules, whichever is later. Rule-5 of the said rules provided that no officer, required to pass the examination will be confirmed before he passes the examination, the

Government however, may grant one or more additional chances in suitable cases, provided that during such period if the officer concerned is not reverted to his substantive post, if any, he shall cease to earn increments. In case of officers appointed by nomination, the period of probation may be extended. Failure to pass the examination may result in termination of service in case of nomination and reversion in case of Departmental candidates. These rules remained in force till they were superseded by the Gujarat Geology and Mining Department (Conditions of Service relating to Gazetted Officers) Examination Rules, 1979. By notification dated 4.8.1972, the Rules regulating to the post of Assistant Geologist, Class-II prescribed under Government Notification dated 29.2.1964, were amended. By virtue of the amendment it was provided that appointment to the post of Assistant Geologist shall be made either by

(a) direct selection or (b) by promotion of a person of proved merit and efficiency from amongst Geological Assistants or Royalty Inspectors who have put in about three years' service and who have passed the prescribed departmental examination, if any. The amended rules also provided that candidates who are appointed by direct selection shall be on probation for a period of two years and shall be required to pass departmental examination and Examination in Hindi and Examination in Regional Language, as prescribed by Rules. This provision, which was earlier applicable to both direct recruits as well as promotees, was made applicable to direct recruits alone. Thus, by virtue of the said amended rule for the first time Royalty Inspectors became eligible for appointment to the post of Assistant Geologist. Under the said rules there were two conditions precedent for promotion to the said post. (1) Such person should have put in above three years' service

and (2) should have passed the prescribed departmental examination, if any.

11. At the relevant time when the amended rules came into force, no departmental examination had been prescribed for promotion to the post of Assistant Geologist. Hence, on 18.10.1973, when the petitioner was promoted to the post of Assistant Geologist, it was permissible to the Royalty Inspectors and Geological Assistants to be promoted to the post of Assistant Geologist even if they did not fulfill the second condition, as no departmental examination had been prescribed till then. However, on the date when the petitioner was promoted to the post of Assistant Geologist, the Rules for Departmental Examination for Gazetted Officers issued vide resolution dated 29.7.1964, were in force. Under Rule-1 of the said rules every Gazetted Officer was required to pass the Departmental Examination

within two years or two chances from the date of his appointment or of the coming into force of the rules, whichever is later.

12. Controversy in issue is whether the promotees are required to pass the departmental examination in the light of Rule-2 of the amended rules read with the existing rules of 29.7.1964. The rules prescribed vide Government Resolution dated 29.7.1964 were superseded by the Gujarat Geology and Mining Department (Conditions of Service relating to Gazetted Officers) Examination Rules, 1979 framed in exercise of powers conferred by the proviso to Article-309 of the Constitution of India. Rule-3 is relevant rule, they shall apply to the persons appointed by promotion or by direct selection to the posts, which inter alia, includes the Assistant Geologist. Rule-2 (e) says that, “Old Rules” means the rules for departmental examination of Gazetted Officers

of the Geology and Mining Department which were in force immediately before the appointed date. Rule-4 says that, in order to be eligible to promotion to the post of Assistant Geologist on or after the appointed date (a) Royalty Inspector or a Geological Assistant who is appointed prior to the appointed date by promotion or otherwise shall have to pass the examination within a period of three years from the appointed date. Rule-8 says that a person who is promoted to the post of Assistant Geologist prior to the appointed date and who has been reverted to the lower post previously held by him for failure to pass the examination under the old rules, he shall, notwithstanding such failure, be eligible to appear at any time in such examination on payment of an examination fee of Rs.30/- and if he passes the examination he shall, be eligible for promotion to the post of Assistant Geologist as provided under Rule-7. Rule-7 says that a

person (other than a direct recruit) who has failed to pass the examination within the specified period and specified chances shall, notwithstanding such failure, be eligible to appear at any time in such examination fee of Rs.30/- and if he passes the said examination he shall be eligible for confirmation and promotion to the post of Assistant Geologist, provided that he shall not be entitled to claim seniority over those who having passed the examination earlier than him have been promoted to the next higher post. Rule-10 says that a Royalty Inspector or Geological Assistant who passes the examination within the specified chances and the specified period shall retain his original seniority even when a person junior to him has passed the examination and also been promoted to the higher post earlier.

13. The petitioner was promoted to the post of Assistant Geologist on 18.10.1973. Under the

then prevailing rules he was required to pass the departmental examination within two years and two chances from the date of his appointment. The petitioner appeared in the year 1974, 1975 and 1976 but could not successfully clear the examination. On or about 26.8.1977 the petitioner submitted form for appearing in the examination to be held in October-November, 1977 alongwith an application requesting the respondents to give him one more chance to appear in the examination. There was no reply to the said letter, but by Office Order dated 8.11.1977, the petitioner was reverted as Royalty Inspector as he had not cleared the Departmental Examination for Gazetted Officers as prescribed under Government Resolution dated 29.7.1964.

14. Initially, when the petition was filed it was the case of the petitioner that the said order was passed in violation of the

principles of natural justice and that the respondents ought to have exercised powers under Rule-5 of the said rules and given the petitioner one or two more additional chances for clearing the departmental examination. It was alleged that he was discriminated as other similarly situated gazetted officers had not been reverted. It was not the case of the petitioner that the petitioner was not required to clear the departmental examination or that the rules of 29.7.1964 were not applicable to him.

15. Subsequently, by way of an amendment a completely new case appears to have been made out on a wrong interpretation of the rules, whereby what was a precondition for being promoted to the post of Assistant Geologist under the new rules has been construed to be a condition for continuing at the promoted post. Since at the relevant time, no rules had been prescribed for departmental

examination for promotion to the post of Assistant Geologist, the same accordingly, have been wrongly construed to mean that no departmental examination had been prescribed in respect of Royalty Inspectors who were promoted to the post of Assistant Geologist.

16. In the above view of the matter, since the order passed by the learned Single Judge is entirely on erroneous premises and it is misconceived of facts and law, the same deserves to be quashed and set aside. Accordingly, it is quashed and set aside. This Letters Patent Appeal is allowed without any order as to costs. It is, however, made clear that outcome of this appeal would not affect to the retiral and pensionary benefits granted to the respondent pursuant to his promotion on 21.12.1991.

17. Since the Letters Patent Appeal is allowed, the rule issued in Civil Application is made

absolute and interim relief granted therein is confirmed. Civil Application is accordingly disposed of as allowed.

(A. M. KAPADIA, J.) (K. A. PUJ, J.)

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